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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

No. _____

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DENNIS MCCABE

Petitioner-Appellant

- against -

COMMISSIONER OF INTERNAL REVENUE

Respondent-Appellee

----------X

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1) WHETHER PERSONAL CHOICE OF RESIDENCE NEGATES THE DEDUCTABILITY OF ADDITIONAL COMMUTING COSTS WHICH WERE PREVIOUSLY DEDUCTABLE PURSUANT TO THE COURT'S HOLDING IN FAUSNER V. COMMISSIONER?

2) WHETHER ARMED POLICE OFFICERS WHO MUST TRAVEL AN INDIRECT ROUTE TO WORK AS A RESULT OF AN ADJACENT STATE'S PROHIBITION AGAINST POSSESSION OR TRANSPORTATION OF WEAPONS, CAN DEDUCT THE ADDITIONAL COMMUTING EXPENSE?

3) WHETHER A WEAPON CAN BE CONSIDERED A REQUIRED TOOL FOR PURPOSES OF SECTION 162 OF THE INTERNAL REVENUE CODE?

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The petitioner Dennis McCabe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 14, 1982.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix attached hereto. The opinion of the United States Tax Court is reported at 76 T.C. 876 (1981) and appears in the Appendix hereto affixed.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 14, 1982. This petition for certiorari was filed within 90 days of that date and is timely. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

SECTION 162 TRADE OR BUSINESS EXPENSES

(a) IN GENERAL - There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) travelling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business[1] AND

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

STATEMENT OF THE CASE

This case involves the question of whether additional commuting expenses incurred by a New York City Police Officer who was prohibited from travelling through the State of New Jersey with his firearm, are deductable business expenses pursuant to Internal Revenue Code Section 162 and Revenue Ruling 75-380.

New York City Police Department regulations required that all police officers be armed at all times while within the City of New York. Petitioner, a New York City Police Officer, resided in Suffern, New York, a suburb north of New York City and adjacent to New Jersey. The most direct and least costly route of travel by either car or public transportation between petitioner's residence and place of employment is through the State of New Jersey. All parties involved in this litigation stipulated that New Jersey law prohibits petitioner and other similarly situated New York City police officers from carrying their service

revolvers through New Jersey on a daily basis. It was further stipulated that New Jersey authorities will only issue gun permits to persons who individually establish urgent need to possess a gun within the State of New Jersey.

Petitioner maintains and the Tax Court found as fact[1] that petitioner would have utilized less expensive means of commuting to work but for the New Jersey prohibition which precluded petitioner from carrying his service revolver on either public or private transportation through the State of New Jersey.

Petitioner because of the New Jersey

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See McCabe v. Commissioner of Internal Revenue 76 T.C. 876, 881 (1981) "we accordingly find as a fact that petitioner would have commuted to work by using the bus or subway but for the necessity of carrying his service revolver."

prohibition was forced to travel to work in his private car entirely on New York roads. Travelling entirely through New York caused petitioner to incur additional expenses consisting of an additional(.50) fifty cent toll and an additional commuting distance of thirty miles each day.

Petitioner on his 1976 tax return claimed a deduction for the cost of his employer's requirement that he be armed at all times within the City of New York. The Commissioner disallowed the deduction and petitioner instituted the present litigation.

The majority of the Tax Court concurred to an opinion written by Judge Raum. The Court found as fact that petitioner did incur additional expenses because of his employer's requirement that he carry his service revolver but disallowed the deduction because the expenses were related to additional commuting costs which according to the majority's reasoning were personal in nature and therefore nondeductable.

In a concurring opinion Judge Scott

expressed the view that additional expenses for carrying tools would be deductible only if the expenses were in the nature of trailer rental costs.

Judge Fay and Sterrett wrote dissenting, opinions which stated that petitioner's additional expenses were incurred as a result of his employer's requirement that he be armed and thus were deductible business expenses. Judge Wiles and Wilbur joined Judge Strerrett's dissent.

Petitioner appealed the Tax Court decision to the United States Court of Appeals Second Circuit. Circuit Judge Cardamone joined by District Judge Holden [2], affirmed the majority opinion of the tax court. The Court noted the exception to the general rule against deducting commuting expenses which appears in Fausner v. Commissioner [3] but held that petitioner could

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[2] Judge Holden, Chief Judge of the United States District Court for the District of Vermont was sitting by designation.

[3] Fausner v. Commissioner, 413 U.S. 838 (1973).

not deduct his added cost because he chose to live in the suburbs and thus burden himself with additional expenses. Judge Cardamone stated that since the Supreme Court had "provided little or no guidance as [to] what kind of circumstances should trigger "an allocation of expenses, there was no basis upon which to find petitioner's expenses deductible. The Court held that petitioner's expenses could not be "ordinary and necessary" nor related to his employer's requirement that he carry a gun, when the petitioner chose to live outside New York City.

Circuit Judge Meskill in his dissent found that petitioner incurred additional expenses by circumventing New Jersey because of his employer's requirement that he carry his firearm at all times while within the City of New York. The dissent held that these additional expenses should be allocated as business expenses under Fausner[4] and pursuant to Rev. Rul. 75-380 .

Judge Meskill in his dissent pointed out that the majority's reasoning would render meaningless almost all Fausner-type deductions since a taxpayer can always reduce or eliminate excess commuting costs by living closer to his work location. The dissent concluded that to the extent petitioner's change in route of travel was necessary to satisfy his employer's requirement that he be armed, he was entitled to a deduction under 162(a) of the Internal Revenue Code.

Petitioner now prays that this Court grant relief from the adverse decision of the United States Court of Appeals for the Second Circuit.

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[4] See Rev. Rul. 75-380 attached hereto in the Appendix and which states that additional commuting expenses incurred for transporting work implements to and from work are deductible as ordinary and necessary business expenses.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECISION WOULD RENDER MEANINGLESS AND ELIMINATE ALL FAUSNER-TYPE DEDUCTIONS AND CREATES CONFUSION AND INDECISION IN THE APPLICATION OF THE LAW GOVERNING SUCH DEDUCTIONS

The Court in Fausner v. Commissioner[1] held that expenses incurred by happenstance that a taxpayer must carry incidentals of his occupation are nondeductable. However, the Court noted that "additional expenses may at times be incurred for transporting job-required tools and material to and from work." Under such circumstances an allocation of costs between personal and business expenses should be made.

This Court has never defined when and how additional expenses may be deducted, nor if Fausner-type job required tool deductions are applicable to commuting

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1 Fausner v. Commissioner 413 U.S. 838 (1973).

expenses. Until the instant Court of Appeals decision, the Internal Revenue Service as well as commentators interpreted Fausner as allowing deductions for additional commuting expenses incurred as a direct result of an employer's requirement that an employee transport certain tools or material to and from work[2].

The Court of Appeals Second Circuit has held in the instant matter [3] that such deductions are subject to the 'personal choice' doctrine which is articulated in Commissioner v. Flowers[4]. The majority opinion relying on Flowers, denied petitioner's deductions because petitioner chose to live in the suburbs. The Appeals Court reasoned that petitioner's added expenses were attributable to his decision to reside in Suffern, New York, not due to his employer's requirement that he be armed. Such logic is clearly refuted by the simple proposition

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2 See Internal Revenue Ruling 75-380
See 26 Baylor Law Rev. 262 (1974)

3 McCabe v. Commissioner - F2d-(1982) opinion attached heretofore in the Appendix.

that no matter where petitioner resided, he, would not have incurred any additional commuting expenses if the employer had not required that he carry his service revolver at all times within the City of New York.

The Second Circuit's logic inhibits any deduction for tools or material required by the employer to be transported between home and work since an employee can theoretically live next door to his employment and thus avoid any additional expenses necessitated by the transportation of tools or material. The Court of Appeals decision thus precludes any Fausner-type deductions and paves the way to applying the Flowers 'personal choice' doctrine to innumberable inopposite situations.

Concerned with the instant litigation are over one thousand (1000) New York City police officers who reside in northern

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4 Commissioner v. Flowers 326 U.S. 466 (1945). In Flowers the Court established a three part test to determine the deductability of travelling expenses. The personal choice doctrine was directed at a taxpayers decision to establish two residences and is not dispositive of the required 'tool exception' noted in Fausner.

New York suburban counties that are adjacent to New Jersey. These police officers as well as petitioner are prohibited from carrying their service revolvers through the State of New Jersey. Subsequently, these officers must incur additional commuting expenses to circumvent that state. Many of these police officers have been deducting the additional commuting expense since at least 1973, and in some cases have continued taking the Fausner-type deduction through the current tax year [5]. Millions of dollars of questionable deductions are involved just with taxpayers closely connected to the instant litigation [6].

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[5] The McCabe decision was decided on April 14, 1982, the last day on which to prepare tax returns before the April 15th deadline.

[6] Petitioner is represented by general counsel to the New York City Patrolmen's Benevolent Association. The instant litigation was instituted to determine the applicability of Fausner-type deductions to officers living in Northern suburban New York communities.

Moreover, the instant litigation affects thousands of other litigants. As Judge Meskill indicated in his dissent the decision eliminates all Fausner-type deductions because ultimately all additional commuter costs are a result of 'personal choice' of the location of one's residence. The decision is in conflict with Rev. Rul. 75-380 and would eliminate deductions for carpenters, plumbers and others who must utilize vans or trailers to transport employer required tools to and from work. The decision also affects musicans and painters who incur additional expenses to transport bulky instruments or material between home and work.

The 'personal choice' analysis utilized by the majority decision has implications for certain deductions taken by trucking companies, railroads and manufacturers. Trucks and other vehicles transporting flammable, hazardous or radioactive materials are often limited to certain routes and prohibited from entering population centers.

These companies choice of corporate locale affects the cost of complying with these prohibitions and restrictions in the exact manner that petitioner's choice of residence effects his added cost of commuting [7].

In Flowers the Court stated that expenses incurred for travel between residences a taxpayer maintained in two different cities were expenses occasioned solely by the taxpayers personal propensities. Flowers is not dispositive and factually distinguished from the instant matter.

Petitioner pursuant to his employer's directive, had to transport his weapon between home and work. In avoiding a New Jersey prohibition against carrying weapons through that state petitioner incurred additional expenses he would not normally have incurred.

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7 It is important to note that petitioner's place of employment is located in Manhattan. Housing costs preclude petitioner from residing in Manhattan. Average monthly rental costs for a 5 room apartment exceed petitioner's monthly salary.

Flowers is inapplicable because petitioner transported his gun in furtherance of his employer's business of enforcing the law within the City of New York. Petitioner gained no personal benefit from travelling to work armed; but rather furthered his employer's objective by being prepared to enforce the law at all times within the city, whether or not he was on duty.

If in fact Fausner-type deductions are allowable then petitioner is entitled to deduct the additional cost of commuting incurred as a result of the requirement that he transport his service revolver between home and work.

THE COURT OF APPEALS DECISION WAS CLEARLY ERRONEOUS AND IN CONFLICT WITH THE 'REQUIRED TOOLS' EXCEPTION TO THE COMMUTER RULE

The general rule concerning commuting expenses is that the cost of commuting or driving to work is a nondeductible personal expense. Such expenses are nondeductible because they lack a necessary and direct relation to the prosecution of business[1].

An exception to the above rule was created in Rice v. Riddell[2] where the district court permitted a musician to deduct the cost of transporting his instrument to and from work[3]. Rice v. Riddell formed the basis of Rev. Rul. 63-100[4] which established the "but for" test to determine the deductability of commuting expenses. Pursuant to Rev. Rul. 63-100 if a taxpayer would not have incurred certain expenses but for the necessity of taking his job-required tools with him to work then such expenses were deductible. In Tyne v. Commissioner[5] the 7th Circuit adopted an allocation rule and held that

"even if a taxpayer had driven to and from work had it not been necessary to transport his tools," he should be allowed to deduct the portion of his driving expenses which were allowable to the Transportation of Tools.

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1 Commissioner v. Flowers 326 U.S. 465, 473 (1946).

2 Rice v. Riddell 179 F. Supp. 576 (1959).

3 A tuba and violin.

4 Rev. Rul. 63-100 attached hereto in the Appendix, was superseded by Rev. Rul. 75-380.

5 Tyne v. Commissioner 385 F2d 40 (7th Cir. 1967).

In Fausner v. Commissioner,[6] the Court addressed a conflict between the 5th Circuit[7] which refused to allow an allocation of driving expenses merely because tools were carried, and the Second[8] and Seventh Circuits[9] which allowed a portion of expenses to be deducted as ordinary and necessary. In Fausner the Court held that commuting expenses could not be considered ordinary and necessary merely because a taxpayer must carry incidentals of his occupation with him. However, the Court further stated that an allocation of costs may be feasible when additional expenses are incurred for transporting job-required tools.

Following Fausner the Second Circuit in Coker v. Commissioner[10] held that Sulivan was overruled. In Coker the Court held that a taxpayer cannot deduct the cost of driving if he would have utilized his automobile even if not required to carry tools.

In 1975 the Commissioner issued Rev. Rul. 75-380 and revoked Rev. Rul.

63-100. In Rev. Rul. 75-380 the Commissioner eliminated the "but for" test and stated that where a taxpayer incurs additional costs above ordinary commuting expenses because of the necessity of transporting work implements to and from work, he is entitled to deduct such additional costs [11].

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[6] Fausner v. Commissioner 413 U.S. 838 (1973).

[7] Fausner.

[8] See Sulivan v. Commissioner 368 F2d 1007 (2nd Cir. 1966).

[9] Tyne v. Commissioner 385 F2d 40 (7th Cir. 1967).

[10] Coker v. Commissioner 487 F2d 593 (2nd Cir. 1973).

[11] Rev. Rul. 75-380 states in part "thus, where a taxpayer can prove that transportation costs were incurred in addition to the ordinary, nondeductible commuting expenses, and these additional costs are attributable solely to the necessity of transporting work implements to and from the work location, the tax-

footnote 11 continued

payer will be entitled to deduct such additional costs under Section 162 of the code, regardless of whether the primary purpose or "but for" test set forth in Rev. Rul. 63-100 is satisfied." (See Appendix attached heretofor for full text of opinion).

Petitioner in the instant matter incurred additional expenses he would not have ordinarily incurred except for the necessity of transporting his service revolver to and from work. The majority opinion in the Tax Court found as fact that petitioner incurred additional expenses he would not have ordinarily incurred except for the necessity of transporting his service revolver to and from work. The majority opinion in the Tax Court found as fact that petitioner incurred additional commuting expenses solely because of his employer's requirement that he be armed at all times within the City of New York. The Court stated:

> "We accordingly find as fact that petitioner would have commuted to work by using the bus and subway but for the necessity of carrying his service revolver." McCabe v. Commissioner 76 T.C. 876, 881 (1981).

Once the Tax Court found that petitioner incurred additional expenses he would not have incurred "but for" his employer's

requirement that he carry his service revolver; the Tax Court and Court of Appeals were precluded from finding that the expenses were personal and nondeductible.

The Court of Appeals assertion that the Tax Court decision was the result of a determination of fact is clearly erroneous and illogical. As indicated above the facts as found by the Tax Court clearly demonstrated that petitioner incurred added expenses because of his employer's requirement that he be armed. The determination to disallow this deduction as personal was purely a legal determination in which a question of law was unmistakably involved [12]. The Court of Appeals reliance on Chenango Textile Corp. v. Commissioner 148 F2d 296 (2nd Cir. 1945) and Commissioner v. Heininger 320 U.S. 467 (1943) to uphold the Tax Court decision is misplaced and erroneous. Once the Tax Court found that petitioner incurred additional expenses because of his employer's requirement that he be armed, it was clearly an erroneous decision to

deny petitioner's deduction. The Tax Court decision was contrary to the exception noted in Fausner and in direct conflict with the guidelines articulated in Rev. Rul. 75-380. The record definitely and undeniably indicates that the Tax Court misinterpreted the law governing the deductability of additional commuter expenses[12]. The inference derived from the stipulated facts as well as the Tax Court's finding, could only be interpreted as demonstrating that petitioner incurred additional commuting expenses solely because of the requirement that he be armed and enforce the law at all times within the City of New York. The Court of Appeals, thus applied the wrong standard of review in the instant case and committed error in affirming the Tax Court determination.

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[12] See Fausner, supra. Rev. Rul. 75-380.

CONCLUSION

The decision of the Court of Appeals Second Circuit in McCabe v. Commissioner rekindles the conflict and confusion that the Court sought to resolve in Fausner v. Commissioner. The McCabe decision radically alters the prior standards for determining the deductability of additional commuting expenses caused by an employer's requirement that tools be transported to and from work. Furthermore, the 'personal choice' analysis articulated in the McCabe decision would render meaningless all Fausner-type deductions. To insure uniform application of the law and eliminate confusion concerning the deductability of additional commuting expenses, this Court should grant the petition for certiorari and reverse the Judgment below.

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